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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 JESSIHA LANCASTER,

11 Plaintiff,

12 v.

13 HAROLD CLARK, *et al.*,

14 Defendants.

Case No. C07-5251RJB

ORDER ADOPTING THE REPORT  
AND RECOMMENDATION

15 This matter comes before the Court on the Report and Recommendation of United States  
16 Magistrate Judge Karen L. Strombom. Dkt. 137. The Court has reviewed the Report and  
17 Recommendation and the remaining file herein.

18 On May 23, 2008, Defendants filed a motion for summary dismissal of Plaintiff's claims.  
19 Dkt. 129. After granting an extension of time for Plaintiff to file a response, Judge Strombom issued  
20 her Report and Recommendation. Dkt. 137. Plaintiff failed to respond to either the Motion for  
21 Summary Judgment or file objections to the Report and Recommendation. Western District of  
22 Washington Local Fed. R. Civ. P. (b)(2) provides that failure to respond to a motion may be  
23 considered by the court as an admission that the motion has merit. Plaintiffs' failure to respond to  
24 Defendants' motion is so construed. The Report and Recommendation should be adopted.  
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1           Upon de novo review of the motion, the Court notes that Defendant Kevin Boren was not  
2 mentioned in the Motion for Summary Judgment. Dkt. 129. As to Kevin Boren, the Amended  
3 Complaint alleges “[t]his Defendant is a correctional specialist and acted under color of state law and  
4 is responsible for the overall well being of DOC Inmates and acted in his individual and official  
5 capacity as he is named here.” Dkt. 80 at 7. No further mention of him appears in the Amended  
6 Complaint.

7           The Motion for Summary Judgment does move for the dismissal of certain Defendants due to  
8 their lack of personal participation. Dkt. 129. Defendants move, in the Conclusion, for a dismissal  
9 of all claims with prejudice. *Id.*

10          Fed. R. Civ. P. 12(b)(6) motions to dismiss may be based on either the lack of a cognizable  
11 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
12 *Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as  
13 admitted and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d 1295  
14 (9th Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need  
15 detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief  
16 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of  
17 action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(*internal*  
18 *citations omitted*). “Factual allegations must be enough to raise a right to relief above the  
19 speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful  
20 in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to relief that is plausible  
21 on its face.” *Id.* at 1974.

22          Turning to the case at hand, “[a] person deprives another of a constitutional right, where that  
23 person does an affirmative act, participates in another’s affirmative acts, or omits to perform an act  
24 which that person is legally required to do that causes the deprivation of which complaint is made.”  
25 *Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007) (*citing Johnson v. Duffy*, 588 F.2d 740, 743  
26 (9th Cir. 1978)). The “requisite causal connection can be established not only by some kind of direct

1 personal participation in the deprivation, but also by setting in motion a series of acts by others which  
2 the actor knows or reasonably should know would cause others to inflict the constitutional injury.”

3 *Id.*


4 The Amended Complaint does not allege the Kevin Boren did an affirmative act, participated  
5 in another's affirmative acts, or omitted to perform an act which that person is legally required to do  
6 that causes the deprivation of which complaint is made. *Hydrick*, at 988. The Amended Complaint  
7 makes no allegation that Kevin Boren set in “motion a series of acts by others which the actor knows  
8 or reasonably should know would cause others to inflict the constitutional injury.” *Id.* Plaintiff has  
9 failed to state a claim against Defendant Kevin Boren. Accordingly, the claims made against Kevin  
10 Boren, to the extent any are made, should be dismissed without prejudice. *See Empress LLC v. City*  
11 *and County of San Francisco*, 419 F.3d 1052, 1056 n.3 (9th Cir. 2005) (under Fed. R. 12(b)(6),  
12 dismissal of the complaint is appropriate only if it appears beyond doubt that the plaintiff can prove  
13 no set of facts in support of the claim which would entitle him to relief).

14 The Court does hereby find and **ORDER**:

- 15 1) The Court **ADOPTS** the Report and Recommendation (Dkt. 137),
- 16 2) The Defendants’ Motion for Summary Judgment (Dkt. 129) is **GRANTED**;
- 17 3) Plaintiff’s claims against Defendants Joseph Quenga, Kevin Boren, and Travis Boren  
18 are **DISMISSED WITHOUT PREJUDICE**;
- 19 4) Plaintiff’s claims against Defendants Michelle Alejo, Ruben Cedeno, Harold Clarke,  
20 James Dunivan, Bettyjane Ehrlich, Louie Figueroa, Lisa Kessler, Larry Malcom, Fred  
21 Navarro, Steve Ramsey, Marc Stern, Michael Watkins, and Mark Yeager are  
22 **DISMISSED WITH PREJUDICE**;
- 23 5) The Clerk of the Court is instructed to send uncertified copies of this Order to all  
24 parties appearing pro se, to all counsel of record and to the Honorable Karen L.  
25 Strombom.

26 DATED this 17<sup>th</sup> day of September, 2008.

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ROBERT J. BRYAN  
United States District Judge